

V Internal Revenue Service

memorandum

CC:TL:Br3

WEArmstrong

date: DEC 29 1989

to District Counsel, Chicago CC:CHI

from Assistant Chief Counsel (Tax Litigation) CC:TL

subject [REDACTED]
[REDACTED]

This memorandum is in response to your September 28, 1989, memorandum requesting our views regarding certain issues involved in the above-entitled case.

ISSUES

(1) Whether petitioner who filed a joint return with her former husband for [REDACTED] the year to which a [REDACTED] investment tax credit carryback claimed by petitioner and her former husband was applied, is liable for the erroneous refund arising from the carryback. 6411.02-00.

(2) Whether petitioner is liable for an erroneous refund of [REDACTED] taxes arising from the disallowance of a [REDACTED] investment tax credit carryback claimed by petitioner's former husband and his second wife. 6411.02-00.

(3) Whether petitioner is entitled to relief from an income tax liability for [REDACTED] which resulted from erroneous refunds made pursuant to investment tax credit carrybacks. 6013.03-02.

CONCLUSION

Because I.R.C. § 6013(e) relief is not applicable to a deficiency resulting from the disallowance of a carryback on Form 1045, we agree with your conclusion that petitioner's invocation of I.R.C. § 6013(e) will not relieve her from liability attributable to the disallowance of the investment tax credit carrybacks set forth on Forms 1045. Because petitioner did not sign the Form 1045, claiming a carryback of unused investment tax credit from [REDACTED] to [REDACTED], we also agree that petitioner should not be held liable for the [REDACTED] deficiency attributable thereto.

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FACTS

During the relevant years in issue, petitioner was married to [REDACTED]. Prior to their divorce in [REDACTED], petitioner and [REDACTED] filed joint federal tax returns for [REDACTED], [REDACTED], and [REDACTED].

In [REDACTED], petitioner and [REDACTED] filed an Application for Tentative Refund (Form 1045), claiming a carryback of unused investment tax credit from [REDACTED] to tax years [REDACTED], [REDACTED], and [REDACTED]. Pursuant to the application, abatements of tax were made for the years [REDACTED] through [REDACTED] in the respective amounts of \$[REDACTED], \$[REDACTED], and \$[REDACTED]. Those amounts, plus interest thereon, were refunded to petitioner and [REDACTED] in [REDACTED].

On [REDACTED], petitioner and [REDACTED] filed an Amended Individual Income Tax Return (Form 1040X) for [REDACTED]. Pursuant to the amended return, petitioner and [REDACTED] claimed entitlement to a refund for [REDACTED] in the amount of \$[REDACTED] attributable to the carryback of unused investment tax credit for [REDACTED]. The decrease in tax for [REDACTED] shown on the amended return was not allowed and the claimed refund was not made.

On [REDACTED], [REDACTED] and his second wife filed Form 1045, claiming a carryback of unused investment tax credit from [REDACTED] to the taxable years [REDACTED], [REDACTED], and [REDACTED]. Pursuant to the application an abatement of tax was made with respect to [REDACTED] (i.e., the joint income tax liability of petitioner and [REDACTED] in the amount of \$[REDACTED]. Of the \$[REDACTED] credit balance, \$[REDACTED] was applied to an outstanding balance on the [REDACTED] account of petitioner and [REDACTED], the remainder was applied to the [REDACTED] joint income tax liability of [REDACTED] and his second wife.

On [REDACTED] the Commissioner mailed to petitioner and [REDACTED] a statutory notice of deficiency for taxable year [REDACTED]. The statutory notice disallowed in full the tentative allowances previously made for tax year [REDACTED] pursuant to Forms 1045 filed in [REDACTED], by petitioner and [REDACTED] and [REDACTED], by [REDACTED] and his second wife. The statutory notice also disallowed the claim for refund filed by petitioner and [REDACTED] for [REDACTED] in the amount of \$[REDACTED], which claim had not previously been acted upon by the Service.

In her Tax Court petition, petitioner claims relief from the entire deficiency determined against her for [REDACTED] pursuant to the innocent spouse provisions of I.R.C. § 6013(e). Petitioner also claims that the assertion against her of the portion of the [REDACTED] deficiency attributable to the disallowance of the investment tax credit carryback from [REDACTED] is contrary to the holding of Rev. Rul. 86-57, 1986-1 C.B. 362.

In your memorandum, you conclude that petitioner is not entitled to relief from liability for any portion of the deficiency against her for tax year [REDACTED] under the provisions of I.R.C. § 6013(e). You also conclude that petitioner is not jointly liable for the portion of the [REDACTED] deficiency attributable to the disallowance of a tentative carryback by [REDACTED] and his second wife of investment tax credit from [REDACTED].

In your memorandum you also stated that petitioner's counsel expressed an intention to file a motion for partial summary judgment on the issue of petitioner's liability for the [REDACTED] carryback portion of the [REDACTED] deficiency. You are seeking our views regarding the matter for the following reasons: (1) To obviate the need for the filing of such motion assuming petitioner is correct in her assertion that she should not be held liable for the aforementioned portion of the [REDACTED] deficiency, (2) To ascertain the position that should be maintained in response to petitioner's motion assuming the Government is going to proceed against petitioner for the entire amount of the [REDACTED] deficiency, and (3) To ascertain the Government's litigating position on the innocent spouse issue as to the entire deficiency.

DISCUSSION

In order to obtain innocent-spouse relief under I.R.C. § 6013(e), among other things, a taxpayer must establish that a joint return was filed and on such return there was a substantial understatement of tax attributable to the grossly erroneous item of the taxpayer's spouse. The Form 1045 is not a return or joint return. See e.g., Kamens v. United States, 82-2 U.S.T.C. (CCH) 84,942 (W.D. Mo. 1982); Treas. Reg. § 1.6411-1(b)(2). As a result, it is our position that I.R.C. 6013(e) is not applicable to the deficiency resulting from it.

In the instant case, the tax deficiency in issue did not result from a substantial understatement on the joint return or an amended joint return. Rather, the disallowance of the investment tax credit carrybacks on the Forms 1045 caused the tax deficiency for [REDACTED]. Accordingly, because the Form 1045 is not a joint return and I.R.C. § 6013(e) is applicable only to a deficiency on the joint return, we agree with your conclusion that petitioner's invocation of I.R.C. § 6013(e) will not relieve her from the liability for the [REDACTED] deficiency attributable to the disallowance of the investment tax credits set forth on the Forms 1045.

Assuming arguendo that the provisions of I.R.C. § 6013(e) are applicable to the deficiency resulting from the filing of a Form 1045, we do not believe, inter alia, that petitioner meets the requirement of I.R.C. § 6013(e)(1)(C) with respect to the portion of the [REDACTED] tax deficiency attributable to the Form 1045

signed and filed by petitioner and [REDACTED]. This is because we believe petitioner knew or should have known of the transaction that resulted in the deficiency. See Mayworm v. Commissioner, T.C. Memo. 1987-536 (taxpayer was precluded from I.R.C. § 6013(e) relief because she was aware that her husband attempted to recharacterize on the amended return as a loan an item of income). As a result of not meeting the requirement of I.R.C. § 6013(e)(1)(C), petitioner for that reason also would not be entitled to I.R.C. § 6013(e) relief.

With respect to the portion of the [REDACTED] deficiency due to the Form 1045 claiming a carryback of unused investment tax credit from [REDACTED] and signed by [REDACTED] and his second wife, we do not believe that petitioner is liable for that deficiency. This is because petitioner did not sign this Form 1045. As a result, the deficiency resulting from the filing of the Form 1045 by [REDACTED] and his second wife (abatement) was not a [REDACTED] joint or several liability of petitioner but an erroneous refund to [REDACTED].

We believe, as noted in your memorandum, that Fine v. Commissioner, 70 T.C. 684 (1984) supports the position that petitioner is not liable for the portion of the [REDACTED] deficiency attributable to the Form 1045 signed by [REDACTED] and his second wife. In Fine, petitioner and her husband filed a joint return for 1969 and 1972. Later, petitioner and her husband filed Form 1045 claiming an overpayment for 1969 as a result of an alleged net operating loss in 1972. After granting the refund, the respondent determined that petitioner and her husband did not incur a net operating loss in 1972. Respondent further determined a deficiency in petitioner's 1969 income tax in the amount erroneously refunded.

The Tax Court held that respondent was authorized to follow the deficiency procedures prescribed by I.R.C. § 6212 in order to recover the erroneous refund for 1969. In addition to holding that respondent was authorized to follow the deficiency procedures prescribed by I.R.C. § 6212 in order to recover the erroneous refund, the Tax Court stated that petitioner would not have been jointly and severally liable for the 1969 deficiency had she not signed the tentative carryback adjustment claim.

In the instant case, petitioner did not sign the Form 1045 claiming a carryback of unused investment tax credit from [REDACTED]. Therefore, based on Fine, she should not be held liable for the [REDACTED] deficiency attributable thereto.

In your memorandum you requested that we address the statute of limitations question as to petitioner if we determined that petitioner is jointly liable for the portion of the [REDACTED] deficiency attributable to the carryback from [REDACTED]. We did not determine that petitioner was liable for that portion of the

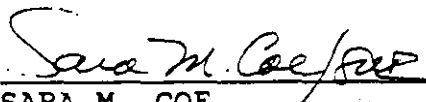
deficiency. Therefore, pursuant to the December 19, 1989 conversation between Ms. Teri A. Frank of your office and Mr. Willie E. Armstrong, Jr. of the Tax Litigation Division, the matter is moot. As to the portion of the [REDACTED] deficiency attributable to the Form 1045 signed by petitioner and [REDACTED] it is our understanding, based on the conversation between Ms. Frank and Mr. Armstrong, that consents to extend the statute of limitations with respect to [REDACTED] were executed by the parties. Therefore, there is no statute of limitations problem with respect to the portion of the [REDACTED] tax deficiency attributable to the Form 1045 signed by petitioner and [REDACTED].

For the reasons noted, we recommend that you concede the portion of the [REDACTED] deficiency attributable to the disallowance of the [REDACTED] investment tax credit carryback. However, we recommend that you continue to maintain the position that petitioner is liable for the [REDACTED] deficiency attributable to the disallowance of the investment tax credit carryback set forth on the Form 1045 signed by petitioner and [REDACTED].

If we can be of further assistance in this matter, please let us know.

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By:


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